

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TILLMAN T. HENDERSON,

Petitioner,

vs.

SCOTT FRAKES, and MICHELLE
CAPPS,

Respondents.

4:19CV3022

MEMORANDUM AND ORDER

This matter is before the court on Petitioner's Motion for Status ([filing no. 29](#)) and Motion for Subpoena Duces Tecum ([filing no. 28](#)). Petitioner's Motion for Status is granted. For the reasons below, Petitioner's Motion for Subpoena Duces Tecum is granted in part and denied in part.

On February 14, 2020, after briefing had been completed and this habeas case was ripe for decision, Respondents filed a Supplemental Designation of State Court Records in Support of Answer ([filing no. 27](#)) to notify the court that Respondents' counsel was contacted by an employee of the Douglas County District Court Clerk's Office and informed that DVDs in Petitioner's case had been located in the Sarpy County District Court Clerk's Office. Counsel was unaware the DVDs were missing from the state court records until the employee contacted her. Counsel further stated that she was in possession of the six DVDs, had reviewed them, determined only one may be relevant to Petitioner's claims, but noted Respondents already filed as part of the state court records the relevant photographs from that DVD. (See [Filing No. 14-23 at CM/ECF pp. 56-57, 62.](#)) Counsel further indicated that copies of the DVDs can be made and filed with the Court upon request.

On February 24, 2020, Petitioner filed his Motion for Subpoena Duces Tecum requesting that Respondents be required “to provide the petitioner with the records (videos) for physical review” “because said D.V.D.’s could be material evidence in the matter” and “are potent[i]ally critical to the defense of his case.” ([Filing No. 28.](#))

“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of course.” *Williams v. Steele*, 2013 WL 5838727, at *2 (E.D. Mo. Oct. 30, 2013) (citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). Rule 6 of the *Rules Governing Section 2254 Cases in the United States District Courts* provides that “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.” In addition, Rule 7 of the *Rules Governing Section 2254 Cases* permits a judge to “direct the parties to expand the record by submitting additional materials relating to the petition.”

Upon consideration, the court will direct Respondents to file copies of the six DVDs identified in the Supplemental Designation of State Court Records for the court to consider along with the petition, answer, the parties’ briefs, and the other state court records on file. Thus, Petitioner’s Motion for Subpoena Duces Tecum is granted to the extent Petitioner seeks to have the court consider the DVDs in assessing his habeas claims. However, Petitioner’s motion is denied to the extent he seeks to have copies of the DVDs physically provided to him at this time¹ as he has failed to demonstrate good cause or need for such discovery or how the DVDs are relevant to his habeas claims. See *Chavez v. Sigler*, 438 F.2d 890,

¹ If the court determines that one or more of the DVDs provide additional evidence that must be considered, the court will enter an order providing both parties the opportunity to submit supplemental briefing as well as providing Petitioner with an opportunity to obtain the substance of the DVD or DVDs that the court may rely upon. Alternatively, if the court determines that it will not rely on any of the DVDs, the court will advise the parties of such and the matter will be deemed submitted.

894 (8th Cir. 1971) (requiring habeas petitioner to “show a reasonably compelling need for the specific documentary evidence which he requests”).

IT IS THEREFORE ORDERED that:

1. Petitioner’s motion for status ([filing no. 29](#)) is granted.
2. Petitioner’s Motion for Subpoena Duces Tecum ([filing no. 28](#)) is granted in part and denied in part as set forth in this Memorandum and Order.
3. By **June 2, 2020**, Respondents shall file with the court copies of the 6 DVDs identified in the Supplemental Designation of State Court Records ([filing no. 27](#)).

Dated this 19th day of May, 2020.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge